

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO

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UNITED STATES OF AMERICA,	:	CASE NO. 1:11-CR-496
Plaintiff,	:	
v.	:	OPINION & ORDER
ALLEN BROWN, JR.,	:	[Resolving Doc. <a href="#">30</a> ]
Defendant.	:	
	:	

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JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On February 16, 2016, Allen Brown requested the appointment of counsel to assist with filing a habeas motion under Title 28 United States Code Section 2255 in light of the Supreme Court's June 2015 decision in *Johnson v. United States*.<sup>1</sup> This Court has reviewed the merits of Brown's potential *Johnson* claim and **DENIES** the motion for appointment of counsel.

### I. Discussion

The appointment of counsel in a civil proceeding is not a constitutional right and is justified only by exceptional circumstances.<sup>2</sup> Section 2255 habeas petitions are civil actions.

Brown would only have a potentially viable *Johnson* claim if his base offense level was increased because of a prior conviction that was a residual clause crime of violence. *Johnson* does not change the career offender decisions involving felony drug convictions and categorical violent crimes.

In calculating Allen Brown's base offense level, the pre-sentence report listed two "felony convictions of either a crime of violence or a controlled substance offense [specifically,

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<sup>1</sup> [\*Johnson v. United States, 135 S. Ct. 2551 \(2015\)\*](#) (holding that imposing an increased sentence under the residual clause of the Armed Career Criminal Act (ACCA) violates the Constitution's guarantee of due process).

<sup>2</sup> [\*Lavado v. Keohane, 992 F.2d 601, 606 \(6th Cir. 1993\)\*](#).

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Attempted Robbery under Cuyahoga County Common Pleas Case No. CR-02-425303 and

Trafficking Offenses under Cuyahoga County Common Pleas Case No. CR-08-508693].”<sup>3</sup>

The controlled substance offense, Trafficking, is not affected by the *Johnson* decision because it was not classified as a crime of violence.

Moreover, a closer examination of Brown’s PSR reveals that he was sentenced for a number of other felony controlled substance offenses, namely, Drug Possession (F4) in Cuyahoga County Common Pleas Case No. CR-05-461617; Drug Possession (F4) in Cuyahoga County Common Pleas Case No. CR-06-0481199-A; and Drug Possession (F4) in Cuyahoga County Common Pleas Case No. CR-06-485033.<sup>4</sup>

Thus, Brown’s career offender guidelines calculation would not be affected post-*Johnson* because the pre-sentence report still lists at least two felony convictions for a controlled substance offense. Even if the attempted robbery offense were not to count as a crime of violence given this Court’s decision in *United States v. Patterson*<sup>5</sup>, Brown’s guidelines calculation would remain the same due to his other felony controlled substance convictions.

Brown has not shown that he has a meritorious *Johnson* claim. He cannot demonstrate that his civil §2255 proceeding is an exceptional circumstance warranting appointment of counsel.

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<sup>3</sup> Presentence Investigation Report at ¶20.

<sup>4</sup> *Id.* at ¶¶54,58,61.

<sup>5</sup> [United States v. Patterson, No. 5:14-CR-289, 2015 WL 5675110, at \\*2 \(N.D. Ohio Sept. 25, 2015\)](#)(finding that Ohio robbery is not a crime of violence post-*Johnson*).

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**II. Conclusion**

For the reasons above, this Court **DENIES** Defendant's motion seeking the appointment of counsel.

IT IS SO ORDERED.

Dated: April 11, 2016

s/ James S. Gwin  
JAMES S. GWIN  
UNITED STATES DISTRICT JUDGE